The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 06-27 September 29, 2006

Petition of The Berkshire Gas Company, pursuant to G.L. c. 164, § 94A, for approval of a gas sales agreement between The Berkshire Gas Company and Coral Energy Resources, L.P.

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D.T.E. 06-27

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I. INTRODUCTION

On February 28, 2006, The Berkshire Gas Company ("Berkshire" or "Company"), pursuant to G.L. c. 164, § 94A, submitted a petition for approval, by the Department of Telecommunications and Energy ("Department"), of a gas sales agreement between Berkshire and Coral Energy Resources, L.P. ("Coral"). The Company's petition was docketed as D.T.E. 06-27.

On March 28, 2006, pursuant to notice duly issued, the Department conducted a public hearing to afford interested persons the opportunity to comment on the Company's proposal. The Attorney General of the Commonwealth ("Attorney General") intervened as of right, pursuant to G.L. c. 12, § 11E.

On May 23, 2006, the Department held an evidentiary hearing. The Company presented the testimony of Jennifer M. Boucher, manager of regulatory economics for Berkshire. In the course of the proceeding, the Company filed a Motion to Maintain the Appropriate Scope of the Proceeding and for Summary Judgment and the Attorney General filed an opposition. Those pleadings are discussed in Section III below. The parties submitted initial briefs on June 2, 2006 and reply briefs on June 9, 2006. The evidentiary record consists of 96 exhibits including the responses to information requests and record requests issued by the Department and the Attorney General.

II. DESCRIPTION OF THE FILING

A. The Sales Agreement

The Company seeks approval of three integrated documents: (i) a North American Energy Standards Board ("NAESB") Base Contract dated November 1, 2005 ("Base Contract"); (ii) a Transaction Confirmation dated December 7, 2005 ("Confirmation"); and (iii) a Letter Agreement dated January 27, 2006 ("Letter Agreement") (Exh. BG-1, at 3). The Base Contract, Confirmation, and Letter Agreement are referred to collectively as the "Sales Agreement."

Berkshire states that the Sales Agreement was negotiated by the Company to replace the Amended Fuel Purchase Agreement ("AFPA") (Exh. AG 1-19, atts. (a), (b)) between Berkshire and the operator of a cogeneration plant located in Pittsfield, Massachusetts (Exh. BG-1, at 6; see also Company Brief at 3).[1] Under the terms of the AFPA, Berkshire could purchase up to 7,500 dekatherms per day ("Dth/d") of the plant's gas supply under certain conditions (Exhs. AG 1-19, atts. (a), (b); BG-1, at 5). Berkshire states that the Sales Agreement, together with the Company's participation in the ConneXion Project,[2] replace and

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[1] The AFPA was approved by the Department in The Berkshire Gas Company, D.P.U. 93-22 (1995).

[2] The ConneXion Project is a pipeline expansion plan designed to increase the capacity of Tennessee Gas Pipeline Company's system to the New England region by adding compression facilities in New York and Massachusetts. The Department recently approved Berkshire's contract for 4,000 Dth/d of gas transportation capacity from the ConneXion Project in The Berkshire Gas Company, D.T.E. 05-58 (2006).

further supplement the peak season rights formerly available pursuant to the AFPA (Exh. DTE 1-1; Tr. at 10-11).

Berkshire states that, in 2004, the operator of the cogeneration plant advised the Company that the operator would no longer make peak season sales pursuant to the AFPA (Exh. AG 1-18 Supp.). In October 2004, the plant operator had released its gas transportation capacity on the Tennessee Gas Pipeline Company ("Tennessee") system (Exhs. BG-1, at 7; AG 1-13; AG 1-18 Supp.; AG 1-22; Tr. at 9-10). According to the Company, it pursued a number of short term actions to replace the resource for the then upcoming 2004/2005 winter heating season (Exh. BG-1, at 6; Tr. at 10). Once the short term arrangements were in place for that heating season, Berkshire states that it continued to evaluate alternatives for the longer term particularly after it was confirmed that the plant operator's Tennessee capacity had been permanently released (Exhs. BG-1, at 9-11; DTE 1-1; DTE 1-2).

The Sales Agreement is for a term of seven years and provides for Coral to deliver a firm gas supply with a maximum daily quantity ("MDQ") of 7,500 Dth/d of primary point firm baseload sales service during the winter heating season, defined as December 1 through February 28, through the 2007/2008 winter heating season (Exhs. BG-1, at 3; BG-3). For the 2008/2009 season through the 2011/2012 season, the MDQ is reduced from 7,500 Dth/d to 5,000 Dth/d (Exhs. BG-1, at 3; BG-3). The Company expects that the reduction in MDQ will coincide with the expected in-service date of the ConneXion Project (Exhs. BG-1, at 9; AG 1-8; Tr. 12-13). All of the gas will be delivered to the Company's Pittsfield citygate, also known as Tennessee Bousquet Meter #020747 (Exh. BG-1, at 3). The Company states that the

Sales Agreement will provide a necessary service at a competitive price, while providing substantial reliability, flexibility, diversity, and stability benefits (Exhs. BG-1, at 9-12; DTE 1-11; AG 1-11; Tr. at 13, 24-25, 29).

B. Request for Proposals Process

On February 4, 2005, Berkshire solicited indications of interest from a number of parties including gas suppliers and local distribution companies ("LDCs") to provide up to a 35-day service during peak periods (Exhs. BG-1, at 9-10; BG-5). Berkshire received several indications of interest (Exh. BG-7). Berkshire then decided to expand the scope of its analysis to consider more seasonal service that could meet peak requirements but that might also secure other benefits (Exh. BG-1, at 10; Tr. at 11-12). On February 22, 2005, the Company issued a follow-up solicitation of interest for providing a 90-day or 151-day service to the same entities (Exhs. BG-1, at 10; BG-6; Tr. at 12). On March 7, 2005, Berkshire issued a formal request for proposals ("RFP") to the seven entities that had expressed an interest in response to the Company's earlier solicitation (Exhs. BG-1, at 10; BG-8). Berkshire received four responses to the RFP with a total of eleven specific proposals (Exhs. BG-1, at 10; BG-9). Coral was one of the respondents.

Berkshire states that each bid was analyzed in detail (Exh. BG-1, at 9-12; Tr. at 12-13). As noted above, the Company has already entered into an agreement with Tennessee Gas Pipeline Company, which the Department approved in D.T.E. 05-58, for 4,000 Dth/d of gas transportation capacity from the ConneXion Project. The Company explains that the ConneXion Project did not address the Company's entire need (Exh. BG-1, at 9; Tr. at 12).

According to Berkshire, its analysis showed that the Sales Agreement with Coral was the resource alternative that would best meet the remainder of the Company's requirements (Exh. BG-1, at 10; Tr. at 12-13).

III. COMPANY MOTION TO MAINTAIN APPROPRIATE SCOPE AND FOR SUMMARY JUDGMENT

A. Introduction

During the evidentiary hearing, the Company moved to limit the scope of the proceeding and/or for summary judgment (Tr. at 38). The Company's motion was made in response to the Attorney General's stated intention to elicit evidence regarding the prudence of the Company's actions related to the loss of the AFPA resource, which the Company contends is outside the proper scope of this proceeding (id. at 39-40).[3] The parties presented preliminary arguments at the hearing (id. at 38-49). On June 9, 2006, the Company filed its Motion to (i) Maintain the Appropriate Scope of Proceeding, (ii) Grant Summary Judgment, and (iii) for such other relief as may be necessary ("Motion"). On June 20, 2006, the Attorney General filed its Opposition to the Motion ("Opposition"). The Motion seeks to limit the scope of the proceeding to those issues set forth in Department precedent as the standard of review for Section 94A contracts (i.e., that the contract is in the public interest)(Motion at 6-7). Further, the Motion's request for Summary Judgment is a request for partial summary

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[3] The Attorney General issued two sets of information requests, many of which related to terms of the AFPA and the loss of the AFPA as a resource. On May 12, 2006, the Attorney General issued a subpoena seeking production of documents relating to the gas supply and transportation agreements of the operator of the cogeneration plant. In his Initial Brief, the Attorney General further argued that the prudence of the Company's actions should be investigated (see Attorney General's Position in Section IV, below).

judgment specifically requesting that the Department find that gas purchase rights under the AFPA are no longer available (id. at 1, 11-13).

B. Company Position

In its Motion, the Company argues that the only issue properly before the Department is whether the Sales Agreement is in the public interest (id. at 6, 8). The Company notes that the Department's standard of review for contracts under G.L. c. 164, § 94A requires that the Company demonstrate that the resource (i) compares favorably to the range of alternative options reasonably available to the Company, and (ii) is consistent with the Company's portfolio objectives (id.). The Company asserts that the Department has previously held that the proper scope of a Section 94A proceeding does not include a prudence review, resource reliability or cost recovery (id. at 7, citing Commonwealth Gas Company, D.P.U. 94-174-A at 30 (1996); see also, id. at 9-10, citing Cambridge Electric Light Company/ Commonwealth Electric Company, D.T.E. 04-60 (2004)).

With regard to its request for partial summary judgment, the Company asserts that the AFPA is no longer available and that it could no longer be part of the Company's plan for reliable service (id. at 5-6, 11). The Company also notes that the Department previously found that the AFPA was "no longer available" (id. at 3, citing The Berkshire Gas Company, D.T.E. 05-58, at 7 (2006)).[4]

[4] The Attorney General intervened, participated in discovery and was represented at the evidentiary hearing but did not file a brief in that proceeding. D.T.E. 05-58, at 1.

C. Attorney General Position

The Attorney General argues that "the Department broadly defined the scope of the proceeding in the Notice of Filing and Public Hearing" (Opposition at 1, 5).[5] The Attorney General notes that the loss of the AFPA contributed to the need to replace the AFPA with new resources, including the proposed Sales Agreement (id. at 5). The Attorney General suggests that the Department review the prudence of the Company's actions in a separate phase II of this proceeding (id. at 6).

With regard to the Company's motion for partial summary judgment, the Attorney General offers no argument that the AFPA resource is still available or that any genuine issue of material fact exists challenging the unavailability of the AFPA resource. Rather, the Attorney General asserts that there is a genuine issue of material fact as to the Company's prudence in handling the loss of the APFA Agreement (id. at 8).

D. Analysis and Findings

In its Notice of Filing and Public Hearing ("Notice"), the Department broadly defined the scope of the proceeding. However, as the Company asserts, in the past, the Department has limited the scope of contract proceedings such as those under Section 94A. See Commonwealth Gas Company, D.P.U. 94-174-A at 30 (1998) (establishing the public interest standard for review of Section 94A contracts and reserving review of other issues, e.g., cost

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[5] The Notice specifically states that the Department will "examine issues including, but not limited to, whether the Agreement [proposed by the Company] is in the public interest and . . . consistent with the Company's most recently filed forecast and supply plan" (Notice of Filing and Public Hearing at 1 (March 9, 2006)).

recovery, for other proceedings); see also Cambridge Electric Light Company/ Commonwealth Electric Company, D.T.E. 04-60 (2004) (upholding hearing officer ruling limiting the scope of the proceeding). As evident from the broad scope of the Notice, the Department will review ancillary issues beyond those specifically stated in the standard of review. However, any such ancillary issues must be rationally related to the proposed contract for which the petitioner seeks approval. In this case, the Attorney General seeks to investigate matters concerning the circumstances surrounding the Company's need for additional supply. These circumstances, while they may merit further investigation, do not relate to the Sales Agreement at issue, and therefore are beyond the scope of this proceeding. Accordingly, the Department grants the Company's Motion to maintain the appropriate scope of the proceeding and limits the scope to whether the Sales Agreement is in the public interest.

The Department's Procedural Rules authorize the use of full or partial summary judgment in Department decisions. 220 C.M.R. § 1.06(6)(e). The rule specifically states that "[a] party may move at any time after the submission of an initial filing for dismissal or summary judgment as to all issues or any issue in the case." Id. Summary Judgment may be granted by an administrative agency where the pleadings and filing conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785-86 (1980); see also Hess & Clark, Div. Rhodia, Inc. v. Food & Drug Admin., 495 F.2d 975, 985 (1974).

In determining whether to grant a motion for summary judgment, the Department will review the initial pleadings, pre-filed testimony, responses to discovery, and the memoranda of

the parties. IMR Telecom, D.P.U. 89-212, at 12 (1990). The Department has stated that summary judgment is appropriate if a review of the material on file shows that there is no genuine issue as to any material fact and the legal effect of the facts entitles either party to summary judgment. See Boston Gas Company, D.P.U. 90-17/18/55, at 10 (1990) aff'd sub nom. Bertone v. Department of Public Utilities, 411 Mass. 53, 538, 550 (1992); Hull Municipal Light Plant, D.P.U., 87-19-A at 25 (1990); IMR Telecom, D.P.U. 89-212, at 12 (1990).

In its Opposition, the Attorney General makes general arguments and alleges specific facts regarding the Company's prudence in protecting its rights under the AFPA. However, to defeat a motion for summary judgment, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact. O'Brion, Russell & Co., v. LeMay, 370 Mass. 243, 245 (1976). The Attorney General is correct in his assertion that there is a genuine issue regarding the Company's actions in handling the loss of the APFA Agreement (Opposition at 8). However, the Company is not seeking summary judgment on that issue and the Attorney General does not refute the Company's claim that the AFPA resource is unavailable, nor does the Attorney General allege any specific facts that establish the existence of a genuine issue of material fact regarding whether or not the AFPA is

no longer available.[6] Accordingly, the Department finds that the AFPA resource is no longer available, and the Department grants the Company's Motion for partial summary judgment.

IV. POSITIONS OF THE PARTIES

A. Attorney General

The Attorney General contends that the Company's proposal could result in costly excess capacity because Berkshire's long-range forecast and supply plan, recently approved by the Department in D.T.E. 05-7, shows a design day surplus throughout the forecast period (Attorney General Initial Brief at 2, citing Exh. DTE 1-1). According to the Attorney General, the Company testified that the acquisition of additional resources, the Proposed Agreement, and the ConneXion Agreement would result in excess capacity (id. at 2). The Attorney General states that resources will exceed design day sendout by approximately seven percent for 2006/07, twelve percent in 2007/08, and five percent in 2008/09 (id. at 2; citing Exh. DTE 1-1). The Attorney General argues that "[i]f the Company cannot sell or otherwise use the excess capacity, then customers would experience financial harm from the excess capacity charged to customers through the a cost of gas adjustment [clause] ("CGA[C]")" proceeding (id. at 2). The Attorney General recommends that the Department review the Company's management of its resource portfolio in future CGAC proceedings to determine

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[6] In his Reply Brief, the Attorney General requests that the Department strike, from the Company's Brief, a statement that the Attorney General alleges is unsupported because the Attorney General was denied an opportunity to cross-examine on this issue. The Department has not relied on this statement in making its decision, accordingly, the Attorney General was not prejudiced by this statement and the Department declines this request.

whether customers have experienced financial harm and whether the Company imprudently acquired excess capacity (id.). According to the Attorney General, Department review in a CGAC proceeding would be consistent with the Departments's ruling in Commonwealth Gas Company, D.P.U. 94-174-A, at 30 (1996), where the Department ruled it would investigate whether a company imprudently acquired excess capacity in a rate case or CGAC proceeding (id.).

The Attorney General also contends that the Department should evaluate the Company's actions to determine whether the Company failed to mitigate costs when acquiring capacity (id. at 2-3). The Attorney General argues that the mitigation of costs should be an issue for this proceeding (id. at 3).

B. Company

1. Request for Proposal Process

Berkshire contends that the resource evaluation and RFP process was fair, open and transparent (Company Initial Brief at 9). According to Berkshire, the bidding and evaluation process and the fact that the Company might elect not to select any of the bids received pursuant to the RFP was clearly described to each bidder (Exh. BG-8, at 7). The Company solicited responses from a wide range of potential bidders, who were afforded the opportunity to ask questions concerning the solicitation; Berkshire adds that it received no questions from bidders (Exh. BG-8, at 5; Tr. at 12). Berkshire states that bids were evaluated based upon appropriate criteria that included price and non-price factors (Exh. AG 1-11). According to

Berkshire, no bidder objected to the process or asserted that it was unfairly excluded from consideration or that its bid was unfairly evaluated (Tr. at 12).

2. The Sales Agreement

Berkshire contends that the Sales Agreement provides a necessary service at a competitive price and includes substantial reliability, flexibility, diversity and stability benefits (Exhs. BG-1, at 9-12; AG 1-11; Tr. at 13). First, the Company argues that the Sales Agreement provides reliable service because Coral maintains firm primary delivery rights to Berkshire's Bousquet Meter Station in Pittsfield, Massachusetts (Exh. BG-1, at 10). According to Berkshire, the Sales Agreement provides additional supply from Canadian suppliers and adds a measure of diversity to the Company's resource portfolio (Exhs. BG-1, at 10; AG 1-11; Tr. at 25, 30). Further, the Company states that it negotiated several features that the Company claims enhance the flexibility of the Sales Agreement, including a "buy back" option that requires Coral to buy back unneeded volumes at agreed-upon prices or permits Berkshire to sell unneeded volumes to third parties (Exhs. BG-4; BG-1, at 12; Tr. at 13, 25, 28). Berkshire also negotiated an obligation on Coral's part to seek authority to assign to Berkshire its right of first refusal ("ROFR") with respect to certain underlying Tennessee capacity at the end of the Sales Agreement (Exhs. BG-1, at 11-12; DTE 1-11; Tr. at 13). Berkshire notes that it is entitled to a discount on gas supplied by Coral if the ROFR is not completed. Finally, the Company argues that the Sales Agreement will provide stability because the Company's gas supply resources will have staggered terms (Exh. BG-1, at 12). Thus, the Company contends that the Coral

Agreement was the best available alternative in terms of price and non-price factors because of these additional features.

Berkshire asserts that the Sales Agreement is "consistent with the public interest because it is consistent with the portfolio objectives established in the Company's most recent Forecast and Supply Plan approved in D.T.E. 05-7 and also as established in a recent review of a contract under G.L. c. 164, § 94A" (Company Initial Brief at 6, citing D.T.E. 05-58; Exh. D.T.E. 1-1). Finally, the Company argues the Sales Agreement compares favorably to the range of alternative options reasonable available to the Company and its customers (Company Initial Brief at 7).

In response to the Attorney General's argument that the Sales Agreement will result in an excess level of capacity, Berkshire indicates that the Company maintains an appropriate mix of resources and that the resource mix, including the Sales Agreement, is consistent with prior filings for a forecast and supply plan (Tr. at 35). According to Berkshire, a substantial portion of the Company's peak day capacity is served by propane facilities (approximately eight percent) (Exh. DTE 1-1, att.). Berkshire explained that propane involves mechanical equipment and requires truck delivery raising concerns regarding its reliability (Exhs. DTE 1-13, att. A; DTE 1-14; Tr. at 35). The Company further explained that the mixing limitations for propane affect the ability of the Company to employ this resource efficiently (Company Reply Brief at 2, citing Exhs. DTE 1-14; BG-1, at 7).

Further, the Company contends that its petition is consistent with the Company's portfolio objectives and states that the petition involves a replacement resource (Company Reply

Brief at 2-3). Berkshire argues that the Sales Agreement, together with the transportation resource approved in D.T.E. 05-58, do not materially alter the level of resources available to meet the Company's peak day requirements (Exh. DTE 1-1; Tr. at 26-27).

Finally, the Company contends that consideration of whether a company maintains surplus capacity is not an appropriate issue in a Section 94A proceeding (Company Reply Brief at 3, citing Commonwealth Gas, D.P.U. 94-174A at 30). The Company argues that the Department determined in that case that prudence of resource management is properly considered, in terms of cost recovery, in a rate case or CGAC proceeding and, substantively in a forecast and supply proceeding (Company Reply Brief at 3). The Company urges the Department to reject the Attorney General's assertions that the Company's resource portfolio is not appropriate and instead find that the Sales Agreement is consistent with the Company's portfolio objectives (id. at 3-4).

V. STANDARD OF REVIEW

In evaluating a gas utility's resource options for the acquisition of commodity resources as well as for the acquisition of capacity under G.L. c. 164, § 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. D.P.U. 94-174-A at 27. In order to demonstrate that the proposed acquisition of a resource that provides commodity and/or incremental resources is consistent with the public interest, an LDC must show that the acquisition (1) is consistent with the company's portfolio objectives, and (2) compares favorably to the range of alternative options reasonably available to the company at the time of the acquisition or contract renegotiation. Id.

In establishing that a resource is consistent with the company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved forecast and requirements plan or in a recent review of supply contracts under G.L. c. 164, § 94A, or may describe its objectives in the filing accompanying the proposed resource. Id. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. Id. at 28. As part of the review of relevant price and non-price attributes, the Department considers whether the pricing terms are competitive with those for the broad range of capacity, storage and commodity options that were available to the LDC at the time of the acquisition, as well as with those opportunities that were available to other LDCs in the region. Id. In addition, the Department determines whether the acquisition satisfies the LDC's non-price objectives including, but not limited to, flexibility of nominations and reliability and diversity of supplies. Id. at 29.

VI. ANALYSIS AND FINDINGS

A. The Request for Proposals Process

The bid solicitation and evaluation process followed by Berkshire for procurement of pipeline transportation capacity in this proceeding was the very same bid solicitation and evaluation process approved by the Department in D.T.E. 05-58, which authorized the ConneXion Project noted above. In that case, the Department noted that (i) potential bidders were notified of the wide range of potential services that might be proposed and that the bids would be evaluated on a range of both price and non-price factors, (ii) the RFP provided

potential bidders with the opportunity to ask questions about the RFP process, (iii) no bidder submitted any such questions and (iv) the Company received no objections from potential bidders to indicate that a bid was unfairly evaluated. Our review of the responses to the RFP indicates that the Company's proposal compares favorably to current market offerings considering price and non-price factors, as well as current market conditions facing the Company at the time of the execution of the Sales Agreement. Accordingly, the Department finds that the RFP process conducted by Berkshire for the procurement of the Sales Agreement was fair, open, and transparent, and that the proposed contract compares favorably to the range of alternative options reasonably available to the Company and its customers.

B. The Sales Agreement

As noted above, in establishing that a resource is consistent with the company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved forecast and requirements plan or in a recent review of supply contracts under G.L. c. 164, § 94A. The Attorney General asserts that resources will exceed design day sendout by approximately five to twelve percent over the 2006/07, 2007/08, and 2008/09 heating seasons (Attorney General Initial Brief at 2). The Attorney General hypothesizes that "[i]f the Company cannot sell . . . the excess capacity, then customers would experience financial harm" and suggests that "the Department should review the Company's management of its resource portfolio in future CGA[C] [proceedings]" (id.). The Attorney General goes on to argue that doing so would be consistent with the Department's ruling in D.P.U. 94-174-A, where the

Attorney General claims the Department ruled that it "would investigate whether a company imprudently acquired excess capacity in a rate case or CGAC proceeding" (id.).

However, the Attorney General confuses acquisition of supply contracts with ongoing management of supply contracts. In D.P.U. 94-174-A at 30, the Department noted that, as migration to transportation occurs, LDCs must focus on costs and service quality to ensure that they are competitive. In referring to contracts for incremental capacity, the Department acknowledged that the recovery of the investment may be at issue if load requirements do not increase. D.P.U. 94-174-A at 30. Therefore, the Department added that: "[f]or purposes of cost recovery, the prudence of LDC management of these contracts will be determined in rate cases or CGAC proceedings as appropriate." Id. The Department has not ruled that it would reexamine the acquisition of supply contracts in rate cases or CGAC proceedings. To the contrary, the Department ruled that "we review the prudence of gas supply contract decisions as of the time the utility decided to enter into the contract and not in hindsight with regard to outcome, whether good or ill." Id. at 29.

With regard to the Attorney General's assertion that resources will exceed design day sendout, the Department notes that pipeline resources cannot be acquired for the precise volumes shown as needed for each of the years of a company's forecast and supply plan because there are market forces beyond the LDC's control that determine the volumes and availability of pipeline resources. The Company has shown that a significant percentage of its peak day deliverability relies on propane and has noted the operational and mixing limitations of this resource. The Department recognizes that the limitations associated with propane affect the

Company's ability to employ this resource efficiently, thus making propane less desirable. See KeySpan Energy Delivery New England, D.T.E. 04-91 (2004)(approving the replacement of propane facilities with natural gas resources). Any excess volumes available under the Sales Agreement may be used to replace the requirements derived from propane, thereby minimizing the Company's reliance on those less desirable propane resources.

Furthermore, in the instant proceeding, the Company has shown that the Sales Agreement includes a buyback option which would require Coral to buy back any excess capacity at agreed-upon prices. The availability of this buyback option will minimize any costs associated with unneeded capacity.

Accordingly, the Company has taken the necessary steps to ensure that the Sales Agreement minimizes costs for the Company's firm customers. The Attorney General has the right to petition the Department to review the Company's management of the Coral agreements or any other element of the Company's portfolio (or the Department can initiate its own investigation). However, the Attorney General has erred in interpreting the language in D.P.U. 94-174-A by stating that the Department would "investigate whether the Company imprudently acquired excess capacity in a rate case or CGAC proceeding" (Attorney General Brief at 2). As stated above, the Department indicated that it may investigate the prudence of the *management* of such contracts in a rate case or CGAC proceeding, not re-examine entering into contracts already subjected to § 94A review.

The Department previously found that the Company's agreement with the cogeneration plant in Pittsfield, Massachusetts was necessary to meet seasonal needs in excess of pipeline

entitlements. Berkshire Gas Company, D.P.U. 93-22 (1995). The proposed Coral agreement replaces these volumes, which Berkshire demonstrated in the Company's most recent forecast and supply plan were necessary to meet peak season and peak day requirements reliably. See D.T.E. 05-07. The record indicates that these volumes will continue to be necessary for the Company for the foreseeable future (Exh. DTE 1-1; Tr. at 11) and that the Company has secured a buyback option to minimize the costs of any excess volumes. The Department concludes that the Coral agreement will enable the Company to continue to meet its peak requirements and, therefore, the Department finds that the Sales Agreement is consistent with the Company's resource portfolio objectives established in the Company's most recent forecast and requirements plan in D.T.E. 05-07.

The Sales Agreement compares favorably with the range of alternatives reasonably available to the company. Among the responses to the RFP, the Coral proposal was second only to the ConneXion Project as the least-cost resource with primary delivery. Because the ConneXion Project will not be available until at least the 2007/08 season, and even then will only fully replace 4,000 of the 7,500 Dth/d provided by the AFPA, an additional resource is necessary. The Sales Agreement is the least cost resource available for these volumes. In addition, by adding a Canadian resource, the Sales Agreement will further diversify the Company's portfolio. The Sales Agreement provides reliable service because Coral maintains primary capacity rights on the Tennessee pipeline. The option for the Company to sell unneeded volumes back to Coral adds flexibility to the Company's supply portfolio. Finally, the Sales Agreement provides for the Company to receive either: (i) the ROFR ensuring that the

capacity associated with this agreement remains with Berkshire at the end of the term of the agreement, or (ii) a discount on the price of the commodity. Therefore, the Department finds that the Sales Agreement is competitive with the range of alternatives available to the Company, will contribute to the strength of the Company's overall supply portfolio, and will satisfy the Company's non-price objectives, including flexibility, reliability and diversity.

C. Conclusion

For the reasons stated above, the Department finds that the Agreement enhances the flexibility, reliability, and diversity of the Company's portfolio and is consistent with the Company's portfolio objectives. The Department further concludes that the Agreement compares favorably to the range of alternatives reasonably available to the Company and its customers at the time of the Agreement. Accordingly, the Department finds that the Agreement is consistent with the public interest and it is approved.

Nonetheless, the Attorney General has raised legitimate concerns regarding the circumstances surrounding the loss of the AFPA resource. Accordingly, the Department will open an investigation into the circumstances surrounding the loss of the AFPA resource and the prudence of the Company's actions related thereto, including whether the Company failed to mitigate costs. If the Department finds that the Company did not act prudently, the Department will determine whether or not the Company will be allowed to recover the resulting costs in rates or if such costs will be ascribed to shareholders.

The Company has alleged that an investigation, conducted in this proceeding, would be premature, irresponsible and could seriously prejudice the interest of the Company's customers

(Company Reply Brief at 9). The Company further noted that relevant statutes of limitations have not yet lapsed and the Company is continuing to analyze its options for seeking redress with respect to the AFPA (id. at 10). The Company argued that premature review would be administratively inefficient (id.). The Attorney General, however, argued that delaying review for a rate case or CGAC proceeding would be administratively inefficient (Opposition at 7). The Attorney General argued that waiting for a rate case or CGAC proceeding will pose the risk that evidence may be lost, witnesses may be unavailable, and memories may fade (id. at 7).

Accordingly, although the Department finds that further investigation is warranted, we direct the parties to submit briefs further addressing the appropriate timing of said investigation. In their briefs, the parties should identify the specific areas to be investigated and discuss in detail the appropriate timing of said investigation for each such area.

VII. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Company's Motions related to scope and for partial summary judgment are GRANTED as provided above; and it is

FURTHER ORDERED: That the gas sales agreement between Berkshire and Coral for a term of seven years, filed on February 28, 2006, be and hereby is APPROVED; and it is

FURTHER ORDERED: That the Company shall report annually the status or final disposition of efforts to secure the Right of First Refusal with respect to certain underlying Tennessee capacity at the end of the Sales Agreement; and it is

FURTHER ORDERED: That the Department will open an investigation into the circumstances surrounding the loss of the AFPA resource and the Company's actions related thereto; and it is

FURTHER ORDERED: That no later than November 1, 2006, the Company shall submit a brief addressing the appropriate timing of said investigation. The Attorney General may submit a Reply to the Company's Brief by filing such Reply Brief within 30 days thereafter.

By Order of the Department,

/s/
Judith F. Judson, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Brian Paul Golden, Commissioner

/s/
Soo J. Kim, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.